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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1996

HARRY C. BROWN, SR.,
Probate Judge for Jasper County
South Carolina,

Petitioner,

v.

BOARD OF COMMISSIONERS
ON JUDICIAL STANDARDS
of the Supreme Court of South Carolina,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether an Order of the South Carolina Supreme Court disciplining a State Court Judge for misconduct, and directing the Judge to remit to county government fees received for the performance of marriage ceremonies, raises an important question of federal law under the equal protection or due process clauses of the federal constitution.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Board of Commissioners on Judicial Standards of the Supreme Court of South Carolina respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of South Carolina dated December 10, 1996 filed by Petitioner Harry C. Brown, Probate Judge for Jasper County, South Carolina.

COUNTERSTATEMENT OF THE CASE

A. *Legal Basis for the State Disciplinary Proceedings*

Petitioner is a judge of the probate court for the State of South Carolina and is elected by the qualified electors of Jasper County for the term of four years. S.C. Code Ann. §14-23-30 (1976). Petitioner is a "judge" pursuant to the express provisions of the Rule on Judicial Discipline and Standards, Rule 502, Section 2(b), South Carolina Appellate Court Rules (SCACR). As such, he is part of the Unified State Judicial System over which the S.C. Supreme Court (S.C. Sup. Ct.) exercises jurisdiction pursuant to S.C. Constitution, Article V, Section 1, and the S.C. Sup. Ct.'s inherent common law powers to protect and preserve the judicial system. Matter of Ferguson, 304 S.C. 216, 403 S.E.2d 628 (1991); Parrish v. Gilstrap, 280 S.C. 184, 312 S.E.2d 4 (1984); State, ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1975). As a judge subject to the Code of Judicial Conduct, Petitioner's activities, both judicial and extra-judicial, are subject to scrutiny and regulation by the S.C. Sup. Ct., both sua sponte and through the Board of Commissioners on Judicial Standards (Commission) where the Judge's activities may reflect adversely on the integrity, independence, and impartiality of the State judiciary.

B. *The Code of Judicial Conduct*

The Code of Judicial Conduct is found at Rule 501, SCACR. Canon 2 states that "[A] Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities". Canon 5 generally requires a

judge to regulate his extra-judicial activities to minimize the risk of conflict with judicial duties. Canon 5(C)(1) specifically sets forth the proposition that "a judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves." Canon 6 requires a judge to regularly file reports of compensation received for both quasi-judicial and extra-judicial activities, and precludes a judge from receiving any compensation for extra-judicial activities that "give the appearance of impropriety."

C. *The Factual Background*

In this case, the allegations of misconduct revolve around the facts that the Petitioner, as Jasper County Probate Judge, performs marriage ceremonies during official office hours, as well as on weekends, in the county court house. Jasper County is a border county between Georgia and South Carolina. Restrictions attendant to the issuance of a marriage license in South Carolina are less restrictive than those in border states such as Georgia. (Record below, Tr., vol. 1, p. 54, ll. 11-18; Exh. 7, Article from the Savannah Morning News dated August 8, 1994, entitled "Questions About Marriage Fees Policy Kindled, Probate Judge Keeps Honorariums"). Each year, hundreds of out-of-state couples routinely come to the office of the Judge of Probate in Jasper County to obtain marriage licenses and subsequently to have a marriage ceremony performed, often immediately after the 24 hour statutorily mandated "wait" period which follows the license application. S.C.

Code Ann. § 20-1-230 (1976). The number of marriage licenses routinely issued in Jasper County approach or exceed 1200 per year.[1]

Any persons applying for a marriage license in Jasper County pays the Petitioner a license fee of $10.00 in accordance with the provisions of local law, S.C. Code Ann. § 20-30.3 (1962) (Record below, Complaint Ex.'s 1 & 2). The Petitioner collects the $10.00 license fee and remits this monthly to the County Treasurer (Record below, Tr., vol. 1, p. 46, ll. 16-22).

But Petitioner, like a notary public, also possesses the authority to perform marriages because he is authorized to administer oaths. S.C. Code Ann. §§ 14-23-300 (1976) and 20-1-20 (1985). Because the marriage license applications funnel through the Probate Judge's office, Petitioner performs hundreds of marriage ceremonies each year. The couples obtain an appointment with Petitioner for the marriage ceremony. (Record below, Tr., vol. 2, pp. 50-51). Petitioner usually collects a

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[1] The testimony reflects that in 1991, out of a total of 1,114 marriages performed in Jasper County, 941 were for non-resident couples. In 1992, 1,138 marriage ceremonies were performed in Jasper County, of which 931 were for non-residents. In 1993, 1,152 marriages were performed in that county, of which 961 involved non-resident couples. In 1993, Respondent performed 1,017 of the Jasper County marriage ceremonies, or 88% of the total. In 1994, 1,210 marriages were performed in the county, of which 1,015 were for non-residents. In 1994, Respondent performed 980 of these marriages, or 81% of that annual total. Finally, in 1995, through the month of June, 482 ceremonies were conducted, of which 421 were for non-residents. During that 6 month period, Respondent performed 352 of the Jasper County marriages, or 73% of the total (Tr., vol 1, pp. 40-42).

marriage ceremony "fee" when he conducts a wedding, which Petitioner refers to as a "gift/honorarium" (Record below, Tr., vol. 1, p 47, ll. 14-20). This cash payment or fee is not set by a general or local law or by ordinance, and the amount charged for performing a marriage ceremony may depend upon the time and/or place of the ceremony (Record below, Tr., vol. 1, pp. 46-47).

The Petitioner states that each honorarium varies in amount up to $50.00 and the marriage ceremonies are performed at different times (including week-ends) and in different locations, but some marriage ceremonies are performed in the Probate Judge's office during regular office hours. (Record below, Tr., vol. 1, p. 47). Petitioner does not account for or remit any of the "honoraria" to Jasper County and has never reported any of this compensation on his Rule 501, SCACR, Disclosure Statements or on his Statement of Economic Interests forms filed with the South Carolina State Ethics Commission.

Petitioner has continued this practice of accepting and retaining for his personal use all fees/"honorariums" which he receives for performing marriage ceremonies despite the S.C. Sup. Ct.'s admonition in Matter of Johnson, 302 S.C. 532, 397 S.E.2d 522 (1990), that any fee collected by a probate judge, even if not specifically enumerated by the General Assembly under S.C. Code Ann., Title 8, Chapter 21, Article 7, (dealing with probate fees and costs), belonged to the county and must be remitted by the probate judge to the county treasurer for deposit into the general fund of the county. In Johnson, the probate judge was publicly reprimanded for retaining for his personal use fees received from the Department of Mental Health ("DMH") for hearings

he conducted for DMH patients.[2] There was no fee established by ordinance or statute for conducting those hearings. In the same fashion, the marriage ceremony fee collected by Petitioner is not set by either Jasper County ordinance or by state statute.

D. *The Disciplinary Proceedings*

A formal disciplinary proceeding before the Commission was initiated by a Notice and Complaint dated June 9, 1995, alleging misconduct by the Petitioner in accepting and retaining fees/honorariums for performing marriage ceremonies. (Pet. App. 1-9). An Answer dated July 5, 1995, and an Amended Answer dated September 16, 1995, were filed on behalf of the Petitioner denying misconduct. (Id. at 10-15).

A hearing was held before a three judge panel of Hearing Masters on September 22, 1995. After some testimony was taken, the hearing was continued, and subsequently completed on November 17, 1995.

The Hearing Masters issued a Report dated March 1, 1996, finding that certain allegations of misconduct alleged in the complaint had been proven by clear and convincing evidence, and that the Petitioner had violated Canon 5(C)(1), and Canon 6(C) of the Code of Judicial Conduct, Rule 501,

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[2] The Johnson case is in keeping with the principal enunciated in Spartanburg County v. Pace, 204 S.C. 322, 29 S.E.2d 333 (1944), where the South Carolina Supreme Court, even prior to the passage of the Uniform Judicial Act, was of the view that in those counties where probate judges were placed entirely on a salary (which is the case presently in every county), the salary was "in full", and additional compensation from whatever source was prohibited.

SCACR. The panel recommended a private reprimand.

Pursuant to the Rule on Judicial Discipline and Standards, Rule 502, SCACR, the matter came before the full Commission. The Petitioner, on April 5, 1996, filed Objections to the Report of the Hearing Masters, to which the Examiner filed a Return on April 15, 1996. The Petitioner also filed with the Commission a motion to dismiss and/or to "remand" the matter to the Masters, or, alternatively, to "suspend" the proceedings.

After hearing oral arguments from both the Petitioner and Examiner, and after consideration of the record, the Commission unanimously voted on April 30, 1996, to adopt the Masters' report as to findings of fact and conclusions of law. However, the Commission further voted to reject the Masters' recommendation of a private reprimand, and instead recommended the imposition of a sanction of a public reprimand. (Id. at pp. 45-47).

Thereafter, the Commission certified the record to the S.C. Sup. Ct. (Id. at pp. 19-22). The S.C. Sup. Ct. received briefs and heard oral arguments. On the date of oral arguments, Petitioner served a "Motion to Dismiss or Alternatively to Suspend Further Action". (Id. at pp. 22-26). On September 11, 1996, the S.C. Sup. Ct. issued its Order finding misconduct and imposing a private reprimand. (Id. at pp. 27-28). The S.C. Sup. Ct. held that the retention of fees or honorariums given Petitioner for performing marriage ceremonies is unethical whether or not the collection and retention of such fees are permitted by law. The S.C. Sup. Ct.

directed Petitioner to "henceforth remit any payments received for performance of marriage ceremonies as provided in the County Ordinance." The S.C. Sup. Ct. noted that the Petitioner's failure to comply with this Order "shall result in a more severe sanction than we impose today."

On October 10, 1996, Petitioner sent to the S.C. Sup. Ct. a "notice of appeal" and filed a "request for stay", requesting the S.C. Sup. Ct. to stay its September 11, 1996 Order. (Id. at pp. 29-33). The S.C. Sup. Ct. denied this request and directed that Petitioner file an affidavit that he had complied with the September 11, 1996 order. (Id. at pp. 34-35). Petitioner then filed a "motion for modification" which was denied on November 7, 1996. (Id. at pp. 36-39).

On this same date, the Clerk of the S.C. Sup. Ct. issued a Rule to Show Cause directed to Petitioner why he should not be held in contempt. (Id. at pp. 41-43). The return date for the hearing on the Rule was moved to December 4, 1996. On that date, the Petitioner filed a motion to dismiss the Clerk's Order and Rule to Show Cause. (Id. at pp. 49-64).

On December 18, 1996, the S.C. Sup. Ct. dismissed the Clerk's Rule to Show Cause and issued an order withdrawing the earlier private reprimand and substituting a further Order of discipline. (Appendix A and B to Resp.'s Brief in Opposition). In its December 18th Order, the S.C. Sup. Ct. privately reprimanded Petitioner; ordered Petitioner not to personally retain any further compensation for performing marriages; and specifically directed him to remit to the Jasper County Treasurer, within 15 days of the date of the opinion, all compensation he has received for performing

marriages since September 11, 1996, and any compensation he may receive in the future. The Order further states that Petitioner's failure to comply "may result in a finding of civil or criminal contempt, or the imposition of a more severe form of discipline under Rule 502, SCACR." Id.

Petitioner filed with the S.C. Sup. Ct. a Petition for Rehearing on January 2, 1997 asserting that the December 18th Order violated his equal protection and due process rights under the state and federal constitutions. On January 9, 1997, the S.C. Sup. Ct. issued an Order denying the Petition, finding that it was untimely. The Sup. Ct. also found that even if the motion for rehearing were timely, it was patently frivolous and without merit. (Appendix C to Resp.'s Brief in Opposition).

REASONS FOR DENYING THE WRIT

A. *The Petition Does Not Raise Any Important Issues of Federal Law*

Nothing in these proceedings presents any important question of federal law worthy of certiorari. This Court has always shown particular restraint before intruding into an ongoing disciplinary proceeding by a state court against a member of the state's bar or judiciary. Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982). Federal courts have given exceptional deference to the traditional and primary responsibility of state courts for establishing and enforcing standards of conduct for members of their bars and judicial departments. Gipson v. New Jersey Supreme Court, 558 F.2d 701 (3rd Cir. 1977); American Civil Liberties Union v. Bozardt, 539 F.2d 340 (1976); Geiler v. Commission on Judicial Qualifications, 10

Cal.3d 270, 515 P.2d 1 (1973), cert. denied, 417 U.S. 932 (1974); In re Seraphim, 97 Wis.2d 485, 294 N.W.2d 485, cert. denied sub nom. Seraphim v. Wisconsin, 449 U.S. 994 (1980).[3]

The S.C. Sup. Ct. has determined that Petitioner's retention of marriage fees for his own personal use is inconsistent with the proper performance of his judicial duties. As the S.C. Sup. Ct. clearly stated, "personal retention of payment for performing these marriages involves "an exploitation of [Petitioner's] judicial office for his own personal gain." (Appendix B to Resp.'s Brief in Opposition).

But from the outset of these proceedings, Petitioner has not shown any recognition that, as a judge subject to the Code of Judicial Conduct, Petitioner's activities, both judicial and extra-judicial, are subject to scrutiny and regulation where the judge's activities may reflect adversely on the integrity, independence, and impartiality of the judiciary. Even those non-judicial activities which might otherwise be lawful and carried out by the ordinary citizen may rise to the level of misconduct by a judge if such activities present the appearance of misusing the judicial office, erode public

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[3] The Court has granted certiorari in those disciplinary cases where the appellants' activities have come within the "generous zone of protection" reserved for First Amendment associational freedoms and freedom of expression. In re Primus, 436 U.S. 412 (1978); LandMark Communications Inc. v. Virginia, 435 U.S. 829 (1978). This case, however, clearly does not present any issues which fall within the First Amendment penumbra.

confidence, or appear to distract the judge from his judicial duties. Matter of Peagler, 303 S.C. 458, 401 S.E.2d (1991) (probate judge who continued to serve throughout primary and general elections when he was candidate for office of county supervisor warranted public reprimand); In re Welch, 283 Md. 68, 388 A.2d 535 (1978) (judge of the orphan's court who earned income as a part-time auctioneer, and who failed to disclose this auctioneering income on his financial disclosure forms, deserved censure).

This point was specifically addressed by the S.C. Sup. Ct. in the Order denying the Petition for Rehearing:

> The crux of respondent's argument appears to be that it is impermissible for this Court to hold judges to higher standards than non-judges. This position is patently frivolous. By accepting the position of probate judge, respondent has made himself subject to the Code of Judicial Conduct which does establish much higher standards than those applicable to other members of our society. These higher standards are necessary to maintain the integrity and independence of, and the public's trust and confidence in, the judiciary. We find nothing in the state or federal constitution which prohibits this Court from applying more stringent standards to those who have elected to become judges in this State. See, Hayes v. Alabama Court of Judiciary, 437 So.2d 1276 (Ala. 1983)("Judges are not to be measured by standards of ordinary

men and women."); In re Piper, 271 Or. 726, 534 P.2d 159 (1975)(judges are held to greater standards of ethical conduct than even lawyers).

(Appendix C to Resp.'s Brief in Opposition, pp. C-2 - 3)

B. *The Discipline Imposed in this Case Does Not Violate Petitioner's Due Process or Equal Protection Rights*

Petitioner's primary argument is that the federal Due Process and Equal Protection Clauses preclude the S.C. Sup. Ct. from imposing any discipline because Petitioner has a "vested right" in the compensation he receives for performing marriages. But it is a well-settled principle that property interests are not created by the federal constitution. Instead, they are created and their dimensions are defined by existing roles or understandings that stem from an independent source such as state law. Board of Regents v. Roth, 408 U.S. 564 (1972).

South Carolina follows the generally recognized principle of law that prospective fees or emoluments of a public office are not the property of the incumbent, and do not fall within the constitutional provision against depriving a person of his property. 63A Am. Jur. 2d Public Officers and Employees § 441 (1984), citing Chicago Patrolmen's Association v. City of Chicago, 56 Ill.2d 503, 309 N.E.2d 3, cert den. 419 U.S. 839 (1974).

In O'Shields v. Caldwell, 207 S.C. 194, 35 S.E.2d 184 (1945), the S.C. Sup. Ct. considered the constitutionality of a 1939 Act passed by the General Assembly whereby there was a transition for compensation of

certain county officers, previously paid in whole or in part by fees, to salary alone. The Sup. Ct. found that "[p]ublic officers have no contract or property rights in their offices", 35 S.E.2d at 190, and went on to hold that:

> A public employer, here a county, may reduce the compensation of its officers by means of legislation, in the absence of (state) constitutional restraint (there is no provision in the current state constitution which applies to compensation of probate judges); and the fact of such reduction implies and raises no moral obligation to later return the amount of the reduction.

35 S.E.2d at 192.

Petitioner cannot legitimately establish any property interest in marriage fees within the meaning of the Due Process Clause. Likewise, since state law does not vest any property right in public office, or its fees and emoluments, there is no violation of equal protection. The Equal Protection Clause does not create any new or substantive legal rights or enlarge the general classification of rights existing in any state under its laws, nor does it restrain the normal exercise of governmental power. Jones v. Helms, 452 U.S. 412 (1981); 16A Am. Jur. 2d, Constitutional Law, § 739 (1979).

The private reprimand imposed in this case under the Code of Judicial Conduct, coupled with the further direction that Petitioner desist from personally retaining any compensation for performing marriages in the future, were entirely reasonable and

appropriate. There was a full evidentiary hearing conducted before the Hearing Masters. The evidence contained in the record fully supported the findings of misconduct, and the findings of misconduct warranted the imposition of the sanction imposed by the Sup. Ct.

The Code of Judicial Conduct applies equally to all state court judges under the unified judicial system in South Carolina, and certainly applies to all probate judges who comprise the class to which the Petitioner belongs. There is no claim in this case, and no evidence in the record below, that Petitioner has been singled out for arbitrary treatment by the S.C. Sup. Ct.

This proceeding furthered the valid purposes that underlie the Code of Judicial Conduct: to foster respect for the judiciary as a whole; to prevent conflicts of interest; to avoid impropriety and the appearance of impropriety that demeans a judge's high office; and to prevent the exploitation of the judicial office for personal financial gain. Unless the classification warrants some form of heightened scrutiny because it jeopardizes the exercise of fundamental rights or categorizes on the basis of inherently suspect characteristics, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest. Nordlinger v. Hahn, 505 U.S. 1 (1992).

C. *Petitioner Cannot Rely Upon a Local Law as Authorization to Engage In Conduct Which Is Prohibited By the Code of Judicial Conduct*

Petitioner attempts to posit that a local law (applicable only in Jasper County) passed by the General Assembly in 1974 authorizes him to accept and retain marriage fees. Although this local law has never been specifically challenged, its constitutionality and continued validity is certainly suspect.

This law was passed after Art. VIII, § 7 of the South Carolina Constitution was ratified and became effective in 1973. Art. VIII, § 7 required the General Assembly to provide for county functions only through general laws, and specifically stated that "[n]o laws for a specific county shall be enacted ...". Knight v. Salisbury, 262 S.C. 565, 206 S.E.2d 875 (1974). (See also S.C. Const. art. V, § 1 governing the unified Judicial Department, which also was ratified and became effective in 1973).

Additionally, when the General Assembly passed the Judicial Reform Act in 1976, Act No. 690, 1976 S.C. Acts 1859, the probate courts were brought under the uniform judicial system. The General Assembly reformed on a state-wide basis the method of compensating probate judges, directing counties to pay probate judges on a salary basis, rather than allowing retention of fees or commissions. This Act specifically provided that fees and commissions collected by the probate judge "shall be the property

of such county".[4] Article V, § 6, Act No. 690, Id. After 1976, the compensation of probate judges, and the disposition of any fees collected by these judges, were controlled by general law, rather than the local law upon which the Petitioner appears to base his argument.

Petitioner cannot properly rely upon any statute or rule to support his claim of entitlement to marriage fees, nor can he

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[4] In furtherance of this uniform system, the General Assembly has further amended these provisions (Act No. 164, Part I, § 2A, 1979 S.C. Acts 311, 316 and Act No. 678, Part IV, § 1, 1988 S.C. Acts 6239, 6259) to now provide for a uniform salary schedule based on county population codified at S.C. Code Ann. § 8-21-760 & 765 (Supp. 1995). These acts repeal by implication any previous act, special or general, that deal with compensation of probate judges. Additionally, under the authority of Graham v. Creel, 289 S.C. 165, 345 S.E.2d 717, local laws passed by the General Assembly prior to 1973 remain in force and effect (if not implicitly repealed by other general law subsequently passed) until the governing body of the county takes further action. As shown in the record, Jasper County Council in December, 1994, enacted an ordinance which directed that all funds generated from fees collected and monies received by Jasper County departments' employees and/or elected officials should be accounted for and timely deposited with the Jasper County Treasurer's Office. (Record below, Exh. 11). The County Administrator then issued a memorandum to all county department heads and elected officials directing that they deposit into the County general fund "all fees, honorariums, fees collected incident to [their] position and collected on county time or property", and holding each official "accountable" for such fees or collections as of the date of the ordinance. Id. This, together with the language contained in S.C. Code Ann. § 8-21-760 (Supp. 1995), represents a clear mandate that the Respondent must account for and pay into the county's general fund any fees or honorariums collected for performing marriage ceremonies.

identify any "mutually explicit understandings" that create any constitutionally protected property interests in these fees. Perry v. Sinderman, 408 U.S. 593 (1972); Kersey v. Shipley, 673 F.2d 730 (4th Cir. 1982); Hamilton v. Board of Trustees of Oconee County School District, 282 S.C. 519, 319 S.E.2d 717, 721 (Ct. App. 1984).

In the final analysis, the separation of powers doctrine found in the S.C. Constitution, S.C. Const., art. I, § 8, is fatal to Petitioner's contention that a local law can authorize a judge to engage in conduct otherwise prohibited under the Code of Judicial Conduct. This is made clear by the S.C. Sup. Ct. in its Order denying the Petition for Rehearing:

> Respondent also continues to argue that by statute he is authorized to retain fees for performing marriages. First, we disagree with respondent's conclusion that Act No. 1148, 1974 Acts 2632, authorizes respondent to personally retain fees for performing marriages. Second, even if we were to accept respondent's strained interpretation of this statute, we adhere to our position that a statute cannot authorize a judge to engage in conduct which is prohibited by the Code of Judicial Conduct. To hold otherwise would be to seriously diminish the inherent authority given to this Court by the South Carolina Constitution to regulate the conduct of judges.

(Appendix C to Resp.'s Brief in Opposition,

pp. C-3 - 4)

D. *Petitioner Has Been Given Ample Notice that his Conduct Violates the Code of Judicial Conduct*

Petitioner also appears to assert that he was sanctioned "without prior notice". This claim has no basis in fact. The S.C. Sup. Ct, in Matter of Johnson, 302 S.C. 532, 397 S.E.2d 522 (1990), made it clear that probate judges could not continue to personally retain fees as compensation. In Johnson, the judge entered into a written agreement with DMH providing for payment of a hearing fee. In this case, Petitioner reaches an oral understanding about the "honorarium" with the couple for whom he performs the marriage.

The probate judge in the Johnson case, just as the Respondent has done in this case, argued that he could keep these fees for his personal use because these funds were not among those specifically enumerated under Article 7 (of the statutory provisions dealing with probate fees) and therefore did not belong to the county. Citing S.C. Code Ann. § 8-21-760 (1986), the Supreme Court completely rejected this argument:

> Respondent claims his failure to remit the DMH funds to the county was not unlawful under this section because the DMH funds are not among the fees and costs specifically enumerated in Article 7. This claim is untenable. It is undeniable that respondent was acting in his capacity as probate judge when holding the DMH hearings. Any fees collected in his capacity as probate judge are

> "probate fees" governed by Article 7 whether specifically enumerated therein or not.

397 S.E.2d at 523 (emphasis added).

The S.C. Sup. Ct. went on to find that the probate judge's failure to deposit these "fees" in the county fund was a violation of "Canons 1 and 2(A) of the Code of Judicial Conduct in failing to observe high standards of conduct and failing to respect and comply with the law." Whatever the practice in Jasper County may have been or the construction afforded the local laws in effect in regard to these fees prior to the Johnson decision in 1990, the Petitioner was clearly on notice thereafter that his retaining marriage ceremony fees\"honorariums", and failing to turn these funds over to the county, constituted actions likely to be construed by the Sup. Ct. as a violation of the Code of Judicial Conduct.

As the record below reflects, in October, 1994, seven months prior to the filing of a formal complaint against Petitioner, the Advisory Committee on Standards of Judicial Conduct (Rule 503, SCACR) issued its Advisory Opinion No. 26-1994 specifically noting the applicability of the Johnson case and stating unequivocally that "[a] (probate) judge who accepts an honorarium for marital services performed is exploiting his judicial position for his own personal gain and thus violating Canon 5(C)(1)" (Record below, Ex. 3). But Petitioner has continued to retain these fees/"honorariums", even after (1) the advisory opinion was issued in October, 1994; (2) the Judicial Standards Commission began directly questioning the Petitioner about the propriety of this conduct through a series of letters from September, 1994

through April, 1995 (Id. at Exh. 6); and (3) the Jasper County Council passed a local ordinance in December, 1994 specifically directing that all fees and "honorariums" collected by Jasper County "elected officials" be deposited with the Jasper County Treasurer. (Id. at Ex. 11).

All of this occurred several months prior to the filing of the Judicial Standards Commission's formal complaint against Petitioner in June, 1995. As the S.C. Supreme Court has already noted, "the procedural due process afforded to respondent, to include the proceedings before the Judicial Standards Commission, the hearings before this Court, and the opportunity to file a motion for rehearing, are more than sufficient under the due process clauses of both the state and federal constitutions." (Appendix C to Resp.'s Brief in Opposition, p. C-3). Any claim that Petitioner did not have adequate "notice" that his conduct violated the Code of Judicial Conduct is frivolous.

E. *The September 11, 1995 Order in the State Proceedings Is Not a "Final Order"*

Petitioner has also asserted that the September 11, 1996 order of the S.C. Sup. Ct. is the "final order" which he is asking this Court to review pursuant to 28 U.S.C. § 1257(a). (Petition for Writ of Certiorari, pp. 1-2, 15). But this is an ongoing disciplinary proceeding, as evidenced by subsequent orders of the Sup. Ct. (Pet. App. at pp. 34-35, 39; App. A, B, and C to Resp. Brief in Opposition). The September 11, 1996 order has now been withdrawn and the December 18, 1996 order substituted in its place. Id.

Additionally, Petitioner has filed various motions with the Sup. Ct. after the September 11, 1996 private reprimand, none of which are provided for under Rule 502, SCACR. Paragraph 25 of Rule 502, SCACR, provides a procedure for the filing of a "motion for rehearing" within 10 days of the filing of the Sup. Ct.'s decision in a judicial discipline proceeding. The purpose for such a motion is to point out to the Sup. Ct. any issues it may have misapprehended or overlooked.

The Petitioner did not file such a motion in this case after the Sup. Ct. issued its September 11, 1996 order. As the Sup. Ct. observed in its December 18, 1996 order, "We note that [Petitioner} did not file a petition for rehearing with this Court raising the issues he is now raising to the United States Supreme Court." (App. A to Resp. Brief in Opposition). Petitioner then filed a "Petition for Rehearing" with the Sup. Ct. dated January 2, 1997, raising the due process and equal protection arguments. However, the Sup. Ct. in its order denying rehearing found the Petition was untimely under Paragraph 25 of Rule 502, SCACR. (Appendix C to Resp.'s Brief in Opposition).

From this perspective, Petitioner did not adequately exhaust his state remedies. Nor is the finality requirement of 28 U.S.C. § 1257(a) satisfied since the Petitioner is asking this Court to engage in a "piecemeal review" of ongoing state disciplinary proceedings and to unnecessarily intrude in state affairs. North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973).

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari in this case is without merit and should be denied.

Respectfully submitted,

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